Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, ...

No. 74-1598

ROBERT K. WEARY and DALE J. WEARY,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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TABLE OF CONTENTS

I. Opinions Below 1

II. Jurisdiction 2

III. Questions Presented 2

IV. Statute Involved 3

V. Statement of the Case 4

VI. Reasons for Granting the Writ 7

1. The Decision Below As to the Taxable Year 1966 Conflicts with Decisions of the Supreme Court and Various Circuit Courts of Appeals and Specifically the Decision of the Supreme Court in the Idaho Power Company Case, Giving a Reasonable, As Opposed to a Strictly Literal, Interpretation to Provisions of the Code in Order to Effectuate Their Intended Purpose 7

2. The Decision Below As to the Taxable Year 1967 Conflicts with Decisions of Other Circuits Allowing the Deduction of Payments for the Use of Personal, Capital Items for Medical Care; the Cases Allowing Deduction for Contracted Payments for Transporting and Payments for Rental Cars, and Conflicts with the Decision of the Supreme Court in the Idaho Power Company Case 11

3. The Case Below Decides Incorrectly an Important Question of Federal Tax Law That Should Be Resolved by This Court 14

VII. Conclusion 15

Appendix—

Opinion and Judgment, United States Court of Appeals, Tenth Circuit A1

Petition for Rehearing Denied A10
Judgment, United States District Court, District of Kansas A11
Order Overruling Motion for Rehearing A12
Judgment A16
Memorandum of Decision A17

Table of Authorities

CASES

Baer, Reuben A., Estate, ¶67,034 P-H Memo T.C. 11
Calafut, Stanley G., T.C. Memo 1964-239 ..... 7, 11
Gordon, Maurice S., 37 T.C. 986 ..... 7, 11
Holland v. *Commissioner*, 3 Cir., 219 F.2d 934 12
Idaho Power Company v. *U. S.*, ... U.S. ....., 41 L. Ed.2d 535 ..... 6, 8, 9, 10, 13, 14
Lichtenman, Martin J., 37 T.C. 586, 599 12
Pepper, Benjamin F., ¶56,167 P-H Memo T.C. 12
Riach v. *Frank*, 9 Cir., 302 F.2d 374 12
Winderman, Stanley D., 32 T.C. 1197 12

STATUTES CITED

Internal Revenue Code of 1954:
Section 165 6
Section 167 11
Section 211 11
Section 213 ..... 2, 3, 6, 7, 9, 11, 12
Section 263(a) 8
28 U.S.C. Section 1254(1) 2
Reg. §1.167(g)-1 10
Rev. Rul. 73-189, C.B. 1973-1, p. 139 12-13

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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners, Robert K. Weary and Dale J. Weary, pray that a writ of ceritorari issue to review the decision of the United States Court of Appeals for the Tenth Circuit in the above-entitled case.

I.

OPINIONS BELOW

Opinion and judgment of the Tenth Circuit Court of Appeals, Appeal No. 74-1079, entered March 31, 1975, the opinion being reported at 513 F.2d .....; 35 AFTR 2d 75-574. Order of the Tenth Circuit Court of Appeals denying Petition for Rehearing entered on March 20, 1975. Decision of the District Court for the District of Kansas entered on July 16, 1973; 32 AFTR 2d 73-5560. Judgment of District Court for the District of Kansas, entered on August 6, 1973. Order Overruling Motion for Rehearing entered on December 19, 1973.

II.

JURISDICTION

The judgment of the Court of Appeals was entered on March 31, 1975. A petition for rehearing timely filed was denied on March 20, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

III.

QUESTIONS PRESENTED

1. Where a taxpayer uses his own car for medical travel, is he entitled to deduct as a medical transportation expense under Section 213 of the Internal Revenue Code of 1954, the entire estimated cost of ten cents a mile of operating the car for medical travel, including depreciation, or can the taxpayer only deduct the estimated direct operating costs of five cents per mile?

2. Is the taxpayer entitled to deduct the portion of the sum of $2,086.99 paid for the use of the car during the taxable year (the car being purchased by the taxpayer at the beginning of the year for $4,386.99 and sold by the taxpayer at the end of the year for $2,300.00, or a net cost to the taxpayer of $2,086.99) allocable to medical travel, under the provisions of Section 213 of the Internal Revenue Code of 1954, or is this payment non-deductible because the same could be nothing but depreciation?

IV.

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

Sec. 213. MEDICAL, DENTAL, ETC., EXPENSES.

(a) Allowance of Deduction.—There shall be allowed as a deduction the following amounts, . . .

(1) the amount by which the amount of the expenses paid during the taxable year . . . for medical care of the taxpayer, his spouse and dependents . . . exceeds three percent of the adjusted gross income, . . .

• • •

(e) Definitions.—For purposes of this section—

(1) The term "medical care" means amounts paid—

(A) for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body,

(B) for transportation primarily for and essential to medical care referred to in subparagraph (A), . . .

V.

STATEMENT OF THE CASE

The facts in the case are undisputed and were stipulated. Petitioners, Robert K. Weary and Dale J. Weary, are husband and wife. On April 27, 1964, Mrs. Dale J. Weary was hospitalized in the psychiatric unit of the Kansas University Medical Center in Kansas City, Kansas, as a result of severe depression for which she had been in treatment for some time but which had become psychotic in proportions. Mrs. Weary was hospitalized for an extended period of seven months and on December 5, 1964, was released with the understanding that it would be necessary for her to continue treatment on an outpatient basis, making two trips each week to Kansas City from Junction City, Kansas. The trips of 300 miles each were necessary in order to keep appointments with her psychiatrist, Dr. Lee Denner, a psychiatrist on the staff of the Kansas University Medical Center. In arranging for these trips, it was concluded that the only feasible way of making them was by car, and a 1964 Ford Sedan purchased at a cost of $4,062.42 was used for this purpose. This car was used almost completely by Mrs. Weary for medical travel during the year in question. In 1966, the car was driven approximately 25,000 to 27,000 miles for this medical purpose out of a yearly total of approximately 30,000 miles. In their income tax returns for the year 1966, the petitioners claimed a deduction of ten cents a mile for the mileage driven by Mrs. Weary for medical purposes. The government has allowed a deduction of only five cents a mile. This resulted in an additional assessment of tax and interest for the taxable year of 1966 in the amount of $432.63. This assessment was paid in full.

Because of the mileage on the car and the fact that Mrs. Weary's nervous condition made it absolutely essential that the car used by her be relatively new and in good operating condition at all times so that no difficulties would be encountered on these long trips, the car was sold January 2, 1967, for $1,050.00. At the time of the sale of the old car petitioners purchased a new car at a cost of $4,-386.99. This car was purchased by taxpayers to permit Mrs. Weary to continue her medical travel to Kansas City. During the year 1967 this car was driven a total of approximately 25,000 to 27,000 miles for the medical purposes out of a yearly total of approximately 30,000 miles. This car was sold on December 30, 1967, for $2,300.00, thus making the amount actually paid by the taxpayers for the use of the car during the taxable year 1967, the sum of $2,086.99. For federal income tax purposes the petitioners deducted $2,696.16 as a medical transportation expense. This figure represented five cents a mile for mileage driven by Mrs. Weary to and from her Kansas City appointment. out-of-pocket expenses incurred by Mrs. Weary on the trips and the amount of $1,343.16. The latter figure of $1,-343.16 is the percentage of the amount paid in taxable year 1967 by taxpayers for the use of the car during the year 1967, attributable to medical travel. The government allowed the deduction of five cents per mile, but disallowed the deduction of the additional amount of $1,343.16 actually paid during the taxable year for the use of the car. This resulted in an additional assessment of tax and interest for the taxable year 1967 of $539.15.

On July 31, 1970, petitioners filed claims for refund (Form 843) for the years 1966 and 1967 in the amount of $423.63 and $539.15 respectively. The petitioners waived notice of the disallowance and timely filed suit for refund. The refund for both years was denied by the District Court.

The District Court essentially held that depreciation was not an amount paid within the meaning of Section 213 of the Code as to the year 1966 and that as to the year 1967 the difference in the price paid for the car and the price at which it was sold was a capital loss not deductible under Section 165 of the Code.

Petitioners took an appeal from this decision to the Court of Appeals for the Tenth Circuit, arguing that the Court should reverse and treat depreciation as a payment for the year 1966 in view of the decision of this Court in *Idaho Power Company* v. *U. S.;* and that as to the year 1967 Section 165 of the Code was inapplicable and that the payment actually made in 1967 for the use of the car for medical travel was clearly deductible. The Circuit Court rejected both of these arguments and as to the year 1967 treated Section 165 of the Code as inapplicable, but held that even though there was a payment in the year it was basically for depreciation and therefore not deductible.

VI.

REASONS FOR GRANTING THE WRIT

1. The Decision Below As to the Taxable Year 1966 Conflicts with Decisions of the Supreme Court and Various Circuit Courts of Appeals, and Specifically the Decision of the Supreme Court in the Idaho Power Company Case, Giving a Reasonable, As Opposed to a Strictly Literal, Interpretation to Provisions of the Code in Order to Effectuate Their Intended Purpose.

With respect to the taxable year 1966, the issue presented is basically whether the taxpayer is entitled to deduct under Section 213 of the Code only the direct out-of-pocket costs of operating his own car for medical travel or whether he can also deduct the indirect costs of wear and tear or depreciation and taxes and insurance. Of these direct costs, depreciation is by far the largest single item. These are, of course, costs paid by the taxpayer and the only question is whether they can be deducted.

The Tax Court has taken the narrow view (*Stanley G. Calafut*, T.C. Memo 1964-239; and *Maurice S. Gordon*, 37 T.C. 986) that Section 213 requires a mechanical or actual "payment" during the taxable year and that depreciation is not a payment, but is merely a decline in value.[1] This position has been approved by some circuit courts of appeal, including the court below.

Such an interpretation of Section 213 of the Code is an unwarranted and unreasonable construction of this provision of the Code, and clearly is basically in direct conflict with the recent decision of this Supreme Court in

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1. In these cases the taxpayer's car was purchased prior to the taxable year involved.

Idaho Power Company v. *U. S.*, ... U.S. ....., 41 L.Ed.2d 535. In the latter case the Court held depreciation was an "amount paid out" for purposes of Section 263(a) of the Code so as to require it to be capitalized where the taxpayer used its own trucks to construct its own facility. Thus, the Court stated at page 547:

> There is no question that the cost of the transportation equipment was "paid out" in the same manner as the cost of supplies, materials, and other equipment, and the wages of construction workers. The taxpayer does not question the capitalization of these other items as elements of cost of acquiring a capital asset. We see no reason to treat construction-related depreciation differently. In acquiring the transportation equipment, taxpayer "paid out" the equipment's purchase price; depreciation is simply the means of allocating the payment over the various accounting periods affected. As the Tax Court stated in Brooks v. Commissioner, 50 TC, at 935, "depreciation—inasmuch as it represents a using up of capital—is as much an 'expenditure' as the using up of labor or other items of direct cost."

The Court further reasoned that the statute should not be construed to let the taxpayer that owned the vehicles take an earlier deduction than the similarly situated taxpayer who might lease the vehicles or hire an independent contractor to do the work. The Court stated at pages 545-546:

> An additional pertinent factor is that capitalization of construction-related depreciation by the taxpayer who does its own construction work maintains tax parity with the taxpayer who has its construction work done by an independent contractor. The Depreciation on the contractor's equipment incurred during the performance of the job will be an element of cost charged by the contractor for his construction services, and the entire cost, of course, must be capitalized by the taxpayer having the construction work performed. The Court of Appeals holding would lead to disparate treatment among taxpayers because it would allow the firm with sufficient resources to construct its own facilities and to obtain a current deduction, whereas another firm without such resources would be required to capitalize its entire cost including depreciation charged to it by the contractor.

Here we have an identical situation. If a taxpayer rents a car to complete extensive medical travel during the year, or if he hires an independent contractor (an airline, train, bus, or taxicab) to provide the travel, the government concedes and the courts hold the taxpayer is entitled to the deduction. On the other hand, if the taxpayer attempts to purchase a car for the purpose of accomplishing the same travel at a lesser cost, he loses the deduction under the interpretation given to Section 213 by the court below. Thus, a different tax impact falls on similarly situated taxpayers turning on simply whether the taxpayer owned the vehicle used for medical travel or whether he leased it or contracted for it.

The reasoning of the Supreme Court should be equally applicable in the instant case. Depreciation or wear and tear through usage is a cost clearly paid by the taxpayer. Congress, in enacting Section 213, clearly intended to let taxpayers deduct all the costs of bona fide and necessary medical travel. The literal construction argued for by the government here does not merely delay the deduction as was the result of its argument for a non-literal construction in the *Idaho Power Company* case. It defeats the

deduction completely. It would seem a fortiori that in the situation here under consideration the statute should be given an interpretation that effectuates Congressional purpose, treats depreciation as a "payment" as this Court did in the *Idaho Power Company* case, and thus permits the deduction of a true cost of medical travel as contemplated by the statute.

Finally, in a true economic sense the taxpayer pays for the cost of wear and tear as it occurs. At the beginning and end of a given taxable year a car has a readily determinable fair market value.[2] The ability to sell a car for $3,000 at the beginning of a taxable year and for only $2,000 at the end of the taxable year certainly represents a "payment" of $1,000 in a true economic sense for the use of the car during that taxable year. It has often been observed that taxation is a practical matter and to ignore the reality of this form of payment is arbitrary and unreasonable.

In summary, there is no area of the law where it is more important that the government treat its citizens fairly than that of taxation, if it is to have their respect. The government should not have it both ways. The government should not be permitted to contend that "depreciation" is a "payment" in one situation and deny it in another, simply for the purpose of maximizing its tax bite.

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2. Such valuation for example is required when an asset used for personal purposes is converted to business use. See Reg. §1.167(g)-1.

2. The Decision Below As to the Taxable Year 1967 Conflicts with Decisions of Other Circuits Allowing the Deduction of Payments for the Use of Personal Capital Items for Medical Care; the Cases Allowing Deduction for Contracted Payments for Transporting and Payments for Rental Cars, and Conflicts with the Decision of the Supreme Court in the Idaho Power Company Case.

With respect to the taxable year 1967, the basic issue is whether the portion of an actual payment by the taxpayer for the use of a car allocable to necessary medical travel can be denied as a deduction because it seems "in the nature of" or "akin to" depreciation.

The petitioners made an actual payment for the use of the car during the taxable year. The deduction would seem to fall squarely within the literal language of Section 213. The mechanical element of physical payment during the year, lacking in the *Calafut* and *Gordon* cases, was present. Nevertheless, the court below went a long step beyond any previously decided case and held that even though there was an actual payment during the year for the use of the car for medical travel, it was not deductible because it could be "nothing but depreciation".

Part VII, of Subchapter B, of Chapter 1 of Subtitle A, of the Internal Revenue Code of 1954, which contains Section 213 provides in Section 211 that it is limited only by the provisions of Part IX. It does not provide it is in any way limited by Part VI which contains Section 167 governing the allowance of depreciation as a deduction for property used in a trade or business. Section 167 is therefore basically irrelevant to the allowance of a deduction under Section 213 of the Code.

Nor is it material that the payment is for the purchase of a capital item of a personal nature. The courts have repeatedly rejected such arguments and held payments for a lift or elevator for a heart patient are deductible payments under Section 213. (*Holland* v. *Commissioner*, 3 Cir., 219 F.2d 934; *Riach* v. *Frank*, 9 Cir., 302 F.2d 374).

Nor can a different result be reached where the payment is for the use of a capital item for a period of time within one taxable year. Thus, if a mechanical lift were purchased for the home of a heart patient in January of a given taxable year for $4,000 and sold for $2,000 in November of the same year because of a desire to purchase a different model, the taxpayer would clearly be entitled under the above cases to a $2,000 deduction for the year, the net amount paid. This is true even though it might be described as "nothing but depreciation", although such an appellation seems improper for tax purposes since the taxpayer has terminated his investment in the asset during the taxable year.

Therefore, the decision of the court below would seem to be in fundamental conflict with the decisions of other circuits holding payments for the purchase or use of a personal, capital item for medical care are deductible under Section 213 of the Code.

Also, the decision insofar as it purports to hold that a payment is non-deductible to the extent that it represents or is allocable to a charge for depreciation, clearly conflicts with decided cases and rulings holding that taxpayers can deduct the cost of plane tickets purchased and cars rented for purposes of medical travel. (*Stanley D. Winderman*, 32 T.C. 1197; *Reuben A. Baer Est.*, ¶67,034 P-H Memo T.C.; *Martin J. Lichtenman*, 37 T.C. 586, 599; *Benjamin F. Pepper*, ¶56,167 P-H Memo T.C.; and Rev. Rul. 73-189, C.B. 1973-1,

p. 139). Obviously, the cost of each includes a charge or allowance for depreciation as well as for direct operating expenses. While it might be more difficult to segregate the cost of depreciation in one case as opposed to another, it would seem that consistency demands that if a payment or part of a payment in the taxable year is to be disallowed because it "represents" or is "in the nature of" depreciation in one case it must similarly be disallowed in the other.

Finally, it conflicts with the decision of this Court in the *Idaho Power Company* case in the most appalling way. As noted by Justice Douglas in his dissent in that case (p. 550):

> I suspect that if the life of the vehicle were 40 years and the life of the building were 10 years IRS would be here arguing persuasively that depreciation of the vehicle should be taken over a 40 year period. That is not to impugn the integrity of IRS. It is only an illustration of the capricious character of how law is construed to get from the taxpayer the greatest possible return that is permissible under the Code.

Here the government not only reverses itself and takes the opposite view as suggested by Justice Douglas and argues depreciation is not a payment. It goes further and says a *payment* is really "depreciation" and since it is really "depreciation" it cannot be a "payment". Such esoteric reasoning is certainly more than any simpleminded taxpayer can understand. But more importantly, petitioners believe such reasoning is in complete conflict with the views of the Supreme Court as expressed in the *Idaho Power Company* case. As noted in this case, depreciation is only a means of allocating to a given tax year the cost of an asset used over more than one taxable year. It has nothing to do with the deductibility of the cost of an asset where the

taxpayer's investment in it has been acquired and terminated during one taxable year.

In summary, the decision of the court below as to the year 1967 is in basic or fundamental conflict with the decisions in the above cited cases, as well as with even the clear and literal language of the statute involved. As noted by the dissenting judge below, "in view of *Idaho Power* to endow the government with a 'heads it wins, tails they lose' position in the treatment of depreciation under the circumstances of this case" cannot be justified.

3. The Case Below Decides Incorrectly an Important Question of Federal Tax Law That Should Be Resolved by This Court.

The deduction of expenses for medical travel is an issue that faces literally millions of taxpayers each year. Use of the taxpayer's own car is involved in perhaps ninety percent of these cases. Unfortunately, in most cases, the amounts involved are too small to justify the exorbitant expense of litigating with the government. The result has been to deprive taxpayers of any real opportunity to have their cases heard in this area and to unduly encourage arbitrary treatment on the part of the Internal Revenue Service. This result as well as further sporadic litigation will undoubtedly continue unless this Court intervenes and finally decides the question.

VII.

CONCLUSION

For the reasons set forth above, the petitioners' writ should be granted as requested.

Respectfully submitted,

ROBERT K. WEARY
Attorney for Petitioner

Dated: June 11, 1975.

APPENDIX

NOVEMBER TERM—JANUARY 15, 1975

Before The Honorable David T. Lewis, Chief Judge, The Honorable Oliver Seth, Circuit Judge and The Honorable A Sherman Christensen, District Judge*

*Of The District of Utah Sitting by Designation

No. 74-1079
(D.C. No. T-5152)

ROBERT K. WEARY and DALE J. WEARY,
Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA,
Defendant-Appellee.

(Filed February 10 and March 31, 1975)

This cause came on to be heard on the record on appeal from the United States District Court for the District of Kansas, and was argued by counsel.

On consideration whereof, it is ordered that the judgment of said court is affirmed. Judge Christensen dissenting.

/s/ Howard K. Phillips
Howard K. Phillips
Clerk

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 74-1079

ROBERT K. WEARY and DALE J. WEARY,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

Appeal From The United States District Court
For The District of Kansas
(D.C. # T-5152)

(Filed February 10 and March 31, 1975)

Robert K. Weary, of Weary, Robertson, Schuley & Davis, Junction City, Kansas, for Appellants.

William M. Brown, Attorney, Tax Division, Department of Justice (Scott P. Crampton, Assistant Attorney General, Meyer Rothwacks and Bennet N. Hollander, Attorneys, Tax Division, Department of Justice, Robert J. Roth, United States Attorney, of Counsel, with him on the Brief), for Appellee.

Before LEWIS, Chief Judge, SETH, Circuit Judge, and CHRISTENSEN, District Judge.

SETH, Circuit Judge.

This is an action seeking a refund of income taxes paid by plaintiffs for 1966 and 1967. The claim relates to de-

ductions made for travel expenses for medical care which were disallowed. In 1966 the deduction claimed was at the rate of ten cents per mile for the distance driven in the family car for medical treatment. In 1967 a deduction was claimed at the rate of five cents per mile plus a pro rata part of the difference between the purchase price and the sale price of a car bought and sold in 1967.

The Commissioner allowed only a deduction in each year of five cents per mile. The trial court upheld the position of the Commissioner, and the taxpayers have taken this appeal.

The case was presented on stipulated facts and there is no dispute as to the distance traveled during the year for medical treatment for Mrs. Weary, nor that it was for a deductible purpose (26 U.S.C.A. (I.R.C. 1954) § 213(e)(1)(B)). The dispute centers on the rate per mile in 1966, and the use of the difference in the purchase and the sale price of the car in 1967. The taxpayers did not seek to substantiate any actual travel expense, but used the flat rates indicated, and in 1967 added the change in value of the car. At the times in question, Revenue Procedure 64-15 provided five cents per mile, in the absence of a substantiated actual amount, for medical expense deduction. The rate of ten cents per mile was then provided for business purpose use of a private car.

For 1966 the district court, as indicated, upheld the action of the Commissioner in allowing only five cents per mile as a deduction. The court reasoned that the Wearys had the burden of proving actual expenses beyond five cents per mile, which they had not done. Further the court pointed out that the case law holds that depreciation is not an "amount paid" under section 213. Maurice S. Gordon, 37 T.C. 986; Stanley G. Calafut, T.C. Memo 1964-239. Similarly under section 170, Orr v. United States,

343 F.2d 553 (5th Cir.), depreciation is not an "amount paid." We must agree with this conclusion.

As to 1967, although there is a definite amount paid, the district court upheld denial of a deduction for the depreciation in value attributable to the medical purpose use of the car. The court felt that the loss on the sale of the car was a long term capital loss, section 1222(4), and under section 165 which governs deduction of losses, a personal loss such as this is not deductible. Also it held again that section 213 was not applicable to the depreciation. We agree with the trial court as to 1967 also.

The taxpayers' position is that the term "amount paid" should be liberally construed to allow deduction of the entire cost of operating an automobile under section 213, as it is illogical to allow only part of the cost to be deducted for medical and charitable purposes, but allow all of the cost of operation of the car to be deducted for business purposes. Taxpayers argue that the Internal Revenue Service has established ten cents a mile as the *entire* cost of car operation, thus this amount should be allowed as a section 213 deduction for 1966. Appellants rely in their brief on Cohan v. Comm'r, 39 F.2d 540 (2d Cir.). It is however well established that the business purpose per mile allowance includes depreciation. Thus again the issue before us centers on the matter of depreciation. As to 1967 taxpayers argue that they have actually paid $2,-086.99 for the use of the car, and a proportionate amount of the difference between the purchase price and the sale price is therefore a proper deduction under section 213, since the statute only requires that there be an "amount paid" for medical transportation. They urge also that the sections governing depreciation (section 167) and capital loss on the sale of a personal asset (sections 165, 1222) are not applicable.

As to 1967 the value difference in the car at the purchase and at the sale can be nothing but depreciation. The traditional position of the Internal Revenue Service has been that depreciation is not an "amount paid," for purposes of sections 213 and 170 of the 1954 Code, and is not part of the out-of-pocket expenses of car operation. *Gordon* and *Calafut, supra;* Revenue Ruling 58-279; *Orr, supra.* It would serve no purpose to review the analysis again in this opinion. The Supreme Court has recently held that depreciation is an "amount paid" for purposes of section 263 of the 1954 Code. Comm'r. v. Idaho Power Co., 42 U.S.L.W. 5067. In that case Idaho Power Company had used its construction equipment in improving its own facilities. Thus a portion of the depreciation on such equipment could be attributed to the time spent in constructing capital improvements. Idaho Power sought to deduct this depreciation in the usual manner (section 167). There, however, the Commissioner argued that this portion of the depreciation was an "amount paid out" for capital improvements (section 263) and thus should be capitalized as a part of the cost of the improvement. The Tax Court upheld the Commissioner, and the Ninth Circuit reversed, holding that depreciation is not an amount paid out. The Supreme Court reversed, agreeing with the Commissioner.

It may be argued that the *Idaho Power* case provides authority for holding that depreciation is also an amount paid for purposes of section 213, as argued here by the taxpayers, but we do not agree that it is. In *Idaho Power* the question was one of the timing of a depreciation deduction, or depreciation now versus inclusion in capital improvements to be depreciated at a different rate. In this case the choice is between allowing and denying a deduction for depreciation as a medical expense. We will continue to adhere to the authorities referred to above

and hold that depreciation is not an amount paid within the meaning of section 213. The amount so claimed as a deduction in 1967 was thus properly disallowed. The paid out for capital improvements in *Idaho Power* as compared to the amount paid for medical services presents too great a difference to convince us that the established doctrine should be overturned.

As to 1966, taxpayers have presented no arguments which persuade us that the *Gordon* and *Calafut* authority should not be followed. Since actual expenses for 1966 have not been proved, and the ten cent figure claimed included depreciation, taxpayers are entitled to deduct only five cents per mile under Revenue Procedure 64-15.

The judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 74-1079

ROBERT K. WEARY and DALE J. WEARY,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Christensen, Senior Judge, Dissenting:

I agree with the prevailing opinion that plaintiffs-appellants were not entitled to recover for the taxable year 1966, since technically the expenses in dispute for medical care based on depreciation of the automobile were not "paid during the taxable year".

As to 1967, I think Commissioner v. Idaho Power Co., ... U.S. ....., 42 U.S.L.W. 5067 (1974), controlling in principle against the position of the government here.

Previous to the years in suit it was necessary for the wife of the taxpayer to be hospitalized for some seven months in the psychiatric unit of the Kansas University Medical Center in Kansas City, Kansas, since she was suffering from a severe depression which had become psychotic. Upon her release by the hospital it was necessary for her to continue treatment in an outpatient status by making trips each week to Kansas City from Junction City, Kansas, during both 1966 and 1967, for the purpose of filling appointments with her doctor, a psychiatrist on the staff of the Medical Center. On January 2, 1967, the taxpayer and his wife purchased a 1967 Ford LTD 4-door sedan at a cost of $4,386.99. This car was used by Mrs. Weary for her medical travel to Kansas City during the year 1967 and primarily for this purpose. The approximate total number of miles driven in this car in 1967 was 30,000 miles; the car was sold back to the motor company on December 30, 1967, at a price of $2,300.00. For 1967 the taxpayer deducted for federal income tax purposes $2,696.16 as medical transportation expense, represented by five cents per mile for mileage driven together with less than 70% ($1,343.16) of the difference between the purchase and the selling price of the automobile. While the precise number of miles the car was utilized for other purposes is not revealed by the record, it appears clear that the total depreciation of $2,086.99 was more than fairly discounted on account of any other possible use to reach the taxpayer's "payment" claim of $1,343.16. The prevailing opinion accepts the fact that "there is no dispute as to the distance traveled during the year for medical treatment for Mrs. Weary, nor that it was for a deductible purpose (26 U.S.C.A. (I.R.C. 1954) § 213(e)(1)(B))". Cf. Orr v.

United States, 343 F.2d 553 (5th Cir. 1965) at 558, which indicates that the disallowance turned more on the inadequacy of proof than upon the nature of the claim.

The controlling statute, 26 U.S.C. § 213, provides that "[t]here shall be allowed as a deduction the following amounts . . . (1) the amount by which the amount of the expenses paid during the taxable year . . . for medical care of the taxpayer, his spouse . . . exceeds 3 percent of the adjusted gross income . . . (e)(1) [t]he term 'medical care' means amounts paid (B) for transportation primarily for and essential to medical care. . . ."

Because non-business depreciation is not deductible as an "amount paid" for purposes of Sections 213 and 170 of the 1954 Code does not mean that depreciation actually paid in the taxable year involved under the circumstances of this case is not deductible under Section 213. If the car had been rented for the purpose, the government concedes that the amount paid for this rental would be deductible; it seems probable that such rental would have exceeded the amount claimed and paid by virtue of the depreciation, plus the five cents per mile allowed. It seems excessively grudging against the taxpayer to ignore the realities of the actual payment during the single taxable year by applying rigidly a rule adopted for the purpose of other sections of the Code in disregard of the different context of Section 213.

In *Idaho Power, supra,* "[t]he taxpayer asserts that its transportation equipment is used in its 'trade or business' and that depreciation thereon is therefore deductible under § 167(a)(1) of the Code. The Commissioner concedes that § 167 may be said to have a literal application to depreciation on equipment used in capital construction . . . but contends that the provision must be read in the light of § 263 (a)(1) which specifically disallows any deduction for an

amount 'paid out for new buildings or for permanent improvements or betterments'."

The provisions of Section 213(a)(1) concerning the amount of expenses paid during the taxable year for medical care of the taxpayer or his spouse for similar reason should be given effect.

In *Idaho Power* there was "no question that the cost of the transportation equipment was 'paid out' in the same manner as the cost of supplies, materials, and other equipment, and the wages of construction workers. . . . In acquiring the transportation equipment, taxpayer 'paid out' the equipment's purchase price; depreciation is simply the means of allocating the payment over the various accounting periods affected."

And the established depreciation in the case at bar was similarly "paid" as a medical expense "during the taxable year".

For the reasons indicated, and since I see no justification in view of *Idaho Power* to endow the government with a "heads it wins, tails they lose" position in the treatment of depreciation under the circumstances of this case, I respectfully dissent.

JANUARY TERM—March 20, 1975

Before The Honorable David T. Lewis, Chief Judge, The Honorable Delmas C. Hill, The Honorable Oliver Seth, The Honorable William J. Holloway, Jr., The Honorable Robert H. McWilliams, The Honorable James E. Barrett, The Honorable William E. Doyle, Circuit Judges and The Honorable A. Sherman Christensen, Senior District Court Judge

No. 74-1079

ROBERT K. WEARY, and DALE J. WEARY,
Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA,
Defendant-Appellee.

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc filed by the appellants in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Lewis and Seth (Senior Judge A. Sherman Christensen, District of Utah, sitting by designation, would grant the petition) to whom the case was argued and submitted.

The petition for rehearing having been denied by the original panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ Howard K. Phillips
Howard K. Phillips
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CIVIL NO. T-5152

ROBERT K. WEARY, and DALE J. WEARY,
Plaintiffs

v.

UNITED STATES OF AMERICA,
Defendant

JUDGMENT

(Filed February 20, 1974)

This action having been submitted to the Court on the basis of a stipulation, and certain attachments thereto, plus the briefs of counsel, and this Court being fully advised of this issue herein and having issued a Memorandum of Decision on July 16, 1973 finding for the defendant on all issues, it is hereby,

ORDERED and ADJUDGED that plaintiffs' action be and hereby is dismissed with prejudice and that defendant shall be allowed its costs herein.

/s/ George Templar
United States District Judge

Approved as to Form:

/s/ Robert K. Weary
Robert K. Weary
Counsel for Plaintiffs

/s/ Douglas G. Anderson
Douglas G. Anderson
Counsel for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. T-5152

ROBERT K. WEARY, et al.,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

ORDER OVERRULING MOTION FOR REHEARING

This matter was first considered by the Court after the parties had filed and prepared a stipulation of facts and had fully briefed the issues involved.

On July 16, 1973, a Memorandum of Decision was filed which recites substantially the factual background involved and which need not be repeated in detail here. The Court at that time determined that plaintiffs were not entitled to deduct depreciation on a 1967 Ford LTD which was used by plaintiffs to travel from their home in Junction City to the treating specialist in Kansas City, Kansas, at which place Dale J. Weary was receiving treatment for ailments described in the stipulation. Trips were made weekly from the home to Kansas City and return.

After the Court had filed its Memorandum, plaintiffs sought leave to file and present orally a Motion to Reconsider the Court's ruling and leave was granted. A Motion for Rehearing was then filed (Doc. 14), the case was set for oral argument, and on October 10, 1973 was heard by the Court at which time the matter was taken under advisement.

According to the stipulation (Doc. 7), the plaintiffs claimed a deduction of 10¢ per mile as travel expenses for

medical purposes in the year 1966. The I.R.S. reduced this amount to 5¢ per mile. For the year 1967, plaintiffs claimed a deduction for mileage transportation at the rate of 5¢ per mile, but, in addition, claimed a deduction for proportionate depreciation of the motor vehicle used in that travel amounting to $1,343.16. This latter amount the I.R.S. disallowed on the basis that under applicable regulations a deduction for medical transportation was limited to 5¢ per mile and depreciation of the vehicle used could not be added.

The Court has again read the briefs submitted by the parties and has considered the authorities cited in support of the contentions made to support their respective positions. The heavy expense to which taxpayers have been put would seem to amply justify the claim they make for deducting as a part of the expense, the outlays from their assets referable to the wife's travel for necessary treatment.

This Court is well aware of the harsh results that sometimes occur when the application of laws relating to the raising of revenue is considered. This case is an illustration of such a circumstance.

Fundamentally, the question whether a deduction from gross income shall be allowed in computing the income subject to tax is purely a matter of congressional grace. A deduction may not be taken as a matter of right and to entitle a taxpayer to a deduction from the net income in computing the tax, taxpayer must bring himself within the applicable statute. *Jones* v. *Noble Drilling Co.*, 135 F.2d 721 (10th Cir.). A taxpayer, to be entitled to a deduction, must bring himself within the applicable provision of the revenue act providing therefor. *Ryan* v. *Alexander*, 118 F.2d 744 (10th Cir.).

And in the later case of *Harper Oil Co.* v. *United States*, 425 F.2d 1335 (10th Cir.), the Court said that a deduction is not a matter of right but a matter of legislative grace and must be authorized by a clear provision and a taxpayer has the burden of demonstrating that he is entitled to a deduction. The case also held that unless a tax regulation or ruling is unreasonable and inconsistent with the statutes, it is to be sustained and not overruled except for weighty reasons.

The defendant relies essentially upon language of the statute to support its position. The statute, 26 U.S.C.A. §213, provides, in substance, that "[t]here shall be allowed as a deduction the following amounts . . . (1) the amount by which the amount of expenses paid during the taxable year for medical care of the taxpayer, his spouse . . . exceeds 3% of the adjusted gross income . . . (e)(1) the term "medical care" means the amounts paid . . . (B) for transportation primarily for and essential to medical care."

Here, the defendant simply says the taxpayer may claim the amounts he has actually paid for medical care. He may keep a record supportable by acceptable evidence of the "amounts paid" in connection with the transportation or he is permitted to use the Rev.Proc. 64-15, C.B. 1964-1, p. 676, Appendix, which authorizes a computation to be made on the basis of 5¢ per mile without supporting evidence of the amounts paid. The statute authorizes no other deduction for this purpose and though a denial of an additional deduction for depreciation of the vehicle used may appear to be inequitable, no such item is authorized and may not be allowed.

The statute limits the deduction to "amounts paid." The allowance for depreciation of an item used in business as a capital asset or for production of profit is in an entirely different category (see 26 U.S.C.A. §167(a)(1), and is the basis for allowance of depreciation on the kind of property therein described.

The Court has carefully considered the plaintiffs' contentions and though there can be no doubt that plaintiffs have been required to make the expenditures on which their claims are based, still, we are bound to apply the law as it plainly reads. A claim for depreciation is not included in an amount paid for transportation primarily for and essential to medical care. The provisions of the Internal Revenue Code make no provision for a deduction for depreciation of equipment used primarily for that purpose and for this reason such a deduction may not be allowed.

The plaintiffs' Motion for Rehearing must be overruled.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this 19th day of December, 1973.

/s/ George Templar
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CIVIL NO. T-5152

ROBERT K. WEARY and DALE J. WEARY,
Plaintiffs

vs.

UNITED STATES OF AMERICA,
Defendant

JUDGMENT

(Filed August 6, 1973)

This action having been submitted to the Court on the basis of a stipulation, and certain attachments thereto, plus the briefs of counsel, and this Court being fully advised of this issue herein and having issued a Memorandum of Decision on July 16, 1973 finding for the defendant on all issues, it is hereby,

ORDERED and ADJUDGED that plaintiffs' action be and hereby is dismissed with prejudice and that defendant shall be allowed its costs herein.

/s/ George Templar
United States District Judge

Approved as to Form:

/s/ Robert K. Weary
Robert K. Weary
Counsel for Plaintiffs

/s/ Douglas G. Anderson
Douglas G. Anderson
Counsel for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. T-5152

ROBERT K. WEARY and DALE J. WEARY,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

MEMORANDUM OF DECISION

(Filed July 16, 1973)

This is an income tax case involving deductions for tax years 1966 and 1967 for medical transportation expenses under section 213(e)(1)(B) of the Internal Revenue Code of 1954. The parties have stipulated as to the relevant facts.

Sometime previous to the years here involved, it was necessary for Dale J. Weary, the wife of Robert K. Weary, to be hospitalized for a period of some seven months in the psychiatric unit at the Kansas University Medical Center in Kansas City, Kansas. Mrs. Weary was suffering from severe depression which had become psychotic in proportion.

Subsequent to Mrs. Weary's release from the hospital, it was necessary for her to continue treatment on an outpatient status, making trips each week to Kansas City from Junction City, Kansas, during 1966 and 1967. These trips were made in order to fulfill appointments with her doctor, Lee Denner, a psychiatrist on the staff of the Medical Center.

The round trip distances between Junction City and Kansas City is approximately 300 miles. Mrs. Weary made

80 trips in 1966 for a total of 24,000 miles and she made 85 trips in 1967 for a total of 25,500 miles.

On March 13, 1964, plaintiffs purchased from Goad Motors, Inc., Junction City, Kansas, a 1964 Ford six passenger sedan at a cost of $4,062.42. This car was used by Mrs. Weary for her medical travel to Kansas City in 1966, and a substantial percentage of the miles driven in 1966 was for this purpose. The approximate number of total miles driven in this car in 1966 was 30,000. This car was sold back to Goad Motors, Inc. on January 2, 1967, at a price of $1,050.00.

On January 2, 1967, the plaintiffs purchased from Goad Motors, Inc., Junction City, Kansas, a 1967 Ford LTD four door sedan at a cost of $4,386.99. This car was used by Mrs. Weary for her medical travel to Kansas City during the year 1967, and a substantial percentage of the miles driven in the car in 1967 was for this purpose. The approximate number of miles driven in this car in 1967 was 30,000. This car was sold back to Goad Motors, Inc., on December 30, 1967, at a price of $2,300.00.

For 1966, the plaintiffs deducted for income tax purposes $2,704.00 as travel expenses for medical care. This figure represented the claim of $.10 per mile for mileage driven by Mrs. Weary to and from her Kansas City appointments.

For 1967, the plaintiffs deducted for Federal Income Tax purposes $2,695.16 as a medical transportation expense. This figure represented a claim of $.05 per mile for mileage driven by Mrs. Weary to and from her Kansas City appointments plus an amount of $1,343.16. This latter figure represents a percentage of the difference between the purchase and the selling price of the automobile purchased and sold in 1967 as set out above.

The IRS limited plaintiffs' deduction for medical transportation in 1966 to $1,352.00, one-half of the amount claimed, or mileage at the rate of $.05 per mile.

The IRS limited plaintiffs' deduction for medical transportation in 1967 to $1,352.00, mileage claimed at $.05 per mile, and disallowed plaintiffs' claimed deduction for the amount of plaintiffs' loss on the sale of the automobile detailed previously.

Generally the issue for the Court to decide is, can a taxpayer who uses his personal car for medical care transportation deduct as a transportation medical expense the decrease in value of the car due to such use? The Court's conclusion is no as discussed infra.

Insofar as the 1966 tax year is concerned, the specific issue is, are the taxpayers entitled to deduct $.05 or $.10 per mile for medical mileage?

Section 213 of the Internal Revenue Code of 1954 allows as a deduction the "amounts paid" or "expenses paid" for medical care, and defines medical care as including "transportation primarily for and essential" thereto. The Treasury Department's construction of this statute disallows depreciation as a part of transportation medical expense as not being an "amount paid" or an "expense paid" within the meaning of section 213. See Rev. Proc. 64-15, C.B. 1964-1 (Part 1), p.676, wherein it is stated:

> "Inasmuch as all items relating to the use of an automobile may not be taken into account in computing the amount paid for transportation with respect to the rendering of gratuitious services to charitable organizations or with respect to medical care, for example depreciation, an individual may not use the same standard mileage rate as is permitted by Revenue Procedure 64-10, supra, for an automobile used in a trade

> or business or for the production of income. It has, therefore, been determined that five cents a mile is a reasonable rate which may be used to compute the cost of operating an automobile where such transportation expenses are deductible as a charitable contribution under section 170 of the Code or as a medical expense under section 213 of the Code."

Revenue Procedure 64-10 provides for a standard mileage rate of $.10 per mile for an automobile used in a trade or business or in the production of income, in lieu of actual expenses.

The cases are in accord with the proposition that depreciation is not an "amount paid" or "expense paid" within the meaning of §213. See *Maurice S. Gordon,* 37 T.C. 986 (1962); and *Stanley G. Calafut,* T.C. Memo 1964-239. See also 5 Mertens, Law of Federal Income Taxation, §31A-.08b. Many cases cited by plaintiff are not inconsistent, and a few are in adherence. That is, in *Orr* v. *United States,* 343 F.2d 553 (5th Cir. 1965), in considering a charitable deduction for transportation expense, the court held that depreciation is not a "payment" or transfer of money or property. The plaintiff also relied upon *Montgomery* v. *Commissioner,* 428 F.2d 243 (6th Cir. 1970), which discussed food and lodging while traveling to and from the medical facility, but did not consider the issue now before the Court. However, the Tax Court did consider this issue before appeal to the Sixth Circuit, and held that depreciation was not an expense paid and that since the taxpayer did not meet his burden of showing that his transportation expenses were more than $.05, the $.05 rate per mile allowed by the Commissioner was proper.

In 1 Merten's, Law of Federal Income Taxation, §3.20, it is stated:

> "Treasury Department rules and Regulations will not be disturbed except for cogent reasons or unless contrary to statute or exceeding departmental authority, and they are binding on the Commissioner and taxpayer alike. When a particular construction has been operative over a long period and has acquired the sanction of usage, it is entitled to 'respectful consideration' especially if rights have been adjusted and determined by it for many years, as a change may result in inequitable treatment of similarly situated taxpayers and may occur after many persons have acted upon the faith of the Regulation. The rule is also, perhaps, particularly applicable where a change in the administrative construction would produce great administrative inconvenience or inequality."

The Court knows of no compelling reason why the present construction of §213(e)(1)(B) should be disturbed, and the Court finds that it is neither inconsistent with the statute nor excessive of departmental authority. The taxpayers argue that they should be treated differently because they used their car in excess of 80% of the time in the tax year in question for medical care transportation. This would indeed be unfair and unequal. There is no logical reason why one who uses his car 80% of the time for medical transportation should be entitled to a greater expense deduction per mile than one who uses his car only 1% of the time for medical transportation.

"Deductions from gross income are allowed as a matter of legislative grace. A taxpayer claiming a deduction must bring himself clearly within the terms of the statute authorizing it. And the burden rests upon the taxpayer to point to a statute authorizing the deduction and bring himself clearly within its provisions; otherwise the deduction is to be disallowed." *C.I.R.* v. *Thompson,* 193 F.2d 586

(10th Cir. 1951). See also *Hales-Mullaly* v. *C.I.R.*, 131 F.2d 509 (10th Cir. 1942). Unless a deduction is expressly authorized under the Code, no deduction is allowed for personal, living, or family expenses. Int. Rev. Code of 1964, §262. What could be more personal than medical care? No section of the Code allows a deduction for personal depreciation expenses.

As stated earlier, Revenue Procedure 64-10 allows a deduction of $.05 per mile as a medical care transportation expense in lieu of actual expenses paid in using a personal car. However, if the taxpayer proves expenses paid in excess of $.05, he may deduct such actual expenses. Here taxpayers have not attempted to prove actual expenses in excess of $.05 per mile and since the burden is upon them to do so, the Court finds that the $.05 per mile allowed by the Commissioner was reasonable and proper for tax year 1966.

In tax year 1967 the taxpayers bought at the first of the year and sold at the end of the year a 1967 Ford LTD. They used this car in excess of 80% of the time for medical transportation. They deducted $.05 per mile as a medical transportation expense and also deducted the proportionate loss on the sale of the car as a medical transportation expense. This is clearly not proper under the Code.

The 1967 Ford LTD was a capital asset in the taxpayers' hands. Int. Rev. Code of 1954, §1221. The difference in the price paid and the price it was sold for was a long-term capital loss to the taxpayers. Int. Rev. Code of 1954, §1222(4). Section 165 of the Code allows individuals to deduct only those losses incurred in a trade or business, those incurred in any transaction entered into for profit, and losses of property, incurred due to casualty. The plaintiffs loss in this case is none of these and is not deductible.

Pursuant to the foregoing discussion, the Court finds that medical transportation expenses may not be claimed in excess of $.05 per mile without substantiation of actual expenses paid. The Court assumes per the parties stipulation that this decision decides all the issues between them. The Court directs that the attorney for the Government prepare an order of judgment consistent with this opinion.

IT IS SO ORDERED.

Dated at Topeka, Kansas this 16th day of July, 1973.

/s/ George Templar
United States District Judge

Supreme Court, U. S.
FILED
JUL 18 1975
MICHAEL RODAK, JR., CLERK

No. 74-1598

In the Supreme Court of the United States

OCTOBER TERM, 1975

ROBERT K. WEARY AND DALE J. WEARY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 74-1598

ROBERT K. WEARY AND DALE J. WEARY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

We invite the Court's attention to the following facts which indicate that the petition for a writ of certiorari was filed out of time. The judgment of the court of appeals was entered on January 15, 1975; and petitioners' petition for rehearing and suggestion for rehearing *en banc* were denied on March 20, 1975 (Pet. App. A9-A10). No extension of time for petitioning was obtained, and the 90-day period in 28 U.S.C. 2101(c) for petitioning in civil cases expired on June 18, 1975. The petition was filed on June 19, 1975.

Since the time limit specified by 28 U.S.C. 2101(c) is jurisdictional, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.

DOJ-1975-07

Supreme Court, U. S.
FILED
JUL 28 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1598

ROBERT K. WEARY and DALE J. WEARY,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

MEMORANDUM FOR PETITIONER IN REPLY

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1598

ROBERT K. WEARY and DALE J. WEARY,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

MEMORANDUM FOR PETITIONER IN REPLY

In his Memorandum in Opposition to the Petition for Certiorari, the Solicitor General has opposed the granting of the petition on the grounds that the petition was filed a day late and that the time limit specified in 28 U.S.C.A. 2101(c) is jurisdictional. No authority was cited for this position, the Solicitor apparently relying on the language of the statute itself.

Under previous statutory provisions, the Supreme Court has so held. *Toledo Scale Co.* v. *Computing Scale Co.*, 1922, 261 U.S. 399, 67 L.Ed. 719. However, the statute then provided as follows (Fed. Stat. Anno. Supp. 1918, p. 422):

> "That no writ of error, appeal, or writ of certiorari intended to bring up any cause for review by the Supreme Court shall be allowed or entertained unless duly applied for within three months after entry of the judgment or decree complained of."

This statutory provision clearly made timely filing jurisdictional.

The present statute, however, reads as follows:

> (c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

While this statutory provision could be construed as making a timely filing of the petition jurisdictional, it does not expressly so provide and in view of the change in the statutory language, the petitioner believes it should not be so construed.

Furthermore, since the granting of a writ of certiorari is a matter that rests in the Court's discretion anyway, there really is no sensible reason for holding that the timely filing is jurisdictional. Thus, the delay in filing could certainly be taken into account in determining

whether the petition should be granted or denied. Compare *Pittsburg Towing Co.* v. *Mississippi Valley Barge Line Co.*, 1966, 385 U.S. 32, 17 L.Ed.2d 31; *Johnson* v. *Florida*, 1968, 391 U.S. 596, 20 L.Ed.2d 838; *Communist Party of Indiana* v. *Edgar D. Whitcomb*, 1974, 414 U.S. 441, 38 L.Ed.2d 635, holding timely docketing not to be jurisdictional in the case of an appeal.

The rule contended for by the Solicitor could be extremely arbitrary and harsh in application. In recent years many problems have developed in the regular and orderly delivery of mail. It could well be that a petitioner could mail his petition to the Court for docketing well within time and the petition become lost in the mails with the petitioner not finding out that it had been lost until after time for docketing of the petition had passed. In this situation, if the Solicitor's argument was accepted, there is no way the petitioner could possibly protect himself. Such a harsh rule, where the writ is discretionary in nature in any event, seems difficult to justify.

There seems little point in excuses. Petitioner had thought the petition would be docketed in time. If timely filing is jurisdictional, there would appear to be little petitioner or the Court can do about the matter. All petitioner can say is that it certainly underscores the problems the average citizen has in dealing with this massive government of ours, if he feels aggrieved with respect to income tax matters, a matter that affects everyone. In three short lines the Solicitor avoids dealing with the merits of the matter. Such a result is depressing, to say the least.

ROBERT K. WEARY
Attorney for Petitioner

July, 1975.